83-472

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDWARD M. ATCHISON,

Petitioner,

v.

THE CAREER SERVICE COUNCIL
OF THE STATE OF WYOMING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF WYOMING

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QUESTION PRESENTED FOR REVIEW

Did the Respondent, the Career Service Council of the State of Wyoming, the State District Court, and the Wyoming Supreme Court err in holding that although the Director of the Department placed an "impermissible, improper and unconstitutional" condition upon Petitioner's possibility of lateral transfer (i.e., Petitioner was required to abandon his challenge to the determination that he did not qualify for a supervisory position), his constitutional rights to due process and equal protection of the laws were not violated?

PARTIES TO THE PROCEEDING

All parties to the proceeding have been set forth in the caption of this case.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The Supreme Court of Wyoming has issued an Opinion in this case, a copy of which appears first in the Appendix presented separately herewith.

The District Court of the First Judicial District, Laramie County, Wyoming, has issued an Order and Letter Opinion in this case, a copy of which appears second in the Appendix presented separately herewith.

The Respondent, the Career Service Council of the State of Wyoming, has issued findings of fact, conclusions of law, and an Order in this case, a copy of which appears third in the Appendix presented separately herewith.

STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment and Opinion of the Supreme Court of Wyoming was made and entered on May 17, 1983.

Appellate jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, AMENDMENTS AND STATUTES

U.S. CONST. amend. XIV, Section 1 provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WYO. CONST. art. 1, Section 6 provides:

> "No person shall be deprived of life, liberty or property without due process of law."

WYO. STATUTES Section 9-4-114(c), now 16-3-114(c) provides:

> "(c) To the extent necessary to make a decision and when presented, the reviewing court shall decide

all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(i) Compel agency action unlawfully withheld or unreasonably delayed; and

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege or immunity;

(C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;

(D) Without observance of procedure required by law; or

(E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

STATEMENT OF THE CASE

Petitioner, Edward M. Atchison, was employed on November 1, 1977, as a developmental disabilities state program consultant by the Department. At the time Petitioner interviewed for the consultant position, he was advised that the consultant position would be restructured into two positions to make

one position (i.e., the position responsible for adult programs) supervisory over the position which had been allocated for pre-school programs.

Sometime before December 1, 1977, a position description questionnaire was prepared by Petitioner and his supervisor to reallocate the consultant position held by Petitioner to a new position of developmental disabilities state program supervisor. Petitioner completed an employee qualification statement to the Personnel Division within the Department of Administration and Fiscal Control, which was responsible for reallocating the position and setting minimum

qualifications.

On February 2, 1978, the director of the Department of Health and Social Services advised Petitioner that he failed to qualify for the supervisor position and notified Petitioner that the Personnel Rules required him to vacate his position within 30 days. On the same day, the Personnel Division notified Petitioner that he failed to qualify for the supervisor position under the minimum standards which were established.

On February 3, 1978, Petitioner filed a grievance with the director of the Department and continued working as a consultant until March 3, 1978, which

was the date of his separation as set forth in the February 2, 1978, letter. On or about February 23, 1978, Petitioner met with the director of the Department, at which time the director asked Petitioner to remain in the Department and to accept the second supervised position in the developmental disabilities unit on the condition that Petitioner qualify for the second position for which the minimum qualifications had not, at that time, been established, and on the further condition that Petitioner abandon his grievance as to his failure to qualify for the supervisor position. Petitioner refused the offer.

Petitioner was paid from the date of his separation on March 3, 1978,

until June 19, 1978, at which time he was terminated a second time from state employment for performance which was "less than satisfactory."

The reviews and appeals referred to herein followed.

The federal question sought to be reviewed in this case was raised initially before the Respondent, the Career Service Council of the State of Wyoming, at the hearing before the Council, upon examination of the Director of the Department of Health and Social Services and of the Petitioner, as is evidenced by the Findings Of Fact, Conclusions Of Law, And Order appearing in the Appendix presented separately herewith, and particularly at pages 14

and 15 of said findings, conclusions and order; second, said question was raised before the District Court upon review of the Council's action, by oral argument, as is evidenced by the Order Affirming Administrative Action, and letter opinion appearing in the Appendix presented separately herewith, and particularly at pages 4, 5 and 6 of said letter opinion; and third, said question was raised before the Supreme Court of Wyoming by Brief and oral argument, as is evidenced by the Opinion of the Supreme Court of Wyoming appearing in the Appendix presented separately herewith, and particularly at pages 8, 9 and 10 of the majority opinion, and throughout the entire minority opinion (pages 1-5).

ARGUMENT

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES HAVE BEEN VIOLATED TO THE HARM OF THE PETITIONER

As noted in the Statement Of The Case, supra, and pursuant to the Personnel Rules of the State of Wyoming, Petitioner was entitled to a lateral transfer to a new position in the agency, or an involuntary reappointment to another position, if possible, under the circumstances of the case. Petitioner contends such right was not afforded to him, contrary to constitutional right (due process and equal protection), and without observance of procedure required by law, in violation of W.S. Section 16-3-114(c)(ii)(B,D).

The following statements appear at

page 8 of the majority opinion delivered in this cause in the Supreme Court of Wyoming:

"This is the most troublesome issue on appeal. As previously noted, appellant was given a conditional offer for lateral transfer. The offer was conditioned on his qualifying for the position and abandoning his grievance relative to his failure to receive the supervisor position...

It is indisputable that the director of the Department placed an impermissible, improper and unconstitutional condition upon the lateral transfer; namely, appellant was required to abandon his supervisor position. That this condition was improper was recognized by CSC itself.

It has also been recognized under the holding of Vitarelli v. Seaton, Secretary of the Interior, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959)..." (Emphasis added.)

Vitarelli v. Seaton, Id., of course, stands for the proposition that a government employee who is dismissed in a proceeding which violated the procedural safeguards of the pertinent departmental regulations, must be reinstated subject to any lawful exercise of the power of dismissal.

The majority of the Wyoming Supreme Court concluded, without valid basis, that Petitioner's rights were not, however, violated in this case because isolated excerpts from his testimony indicated that he refused the "offer of

transfer" due to the fact there was no guarantee he would get that job. Petitioner also indicated in testimony that he refused because of the unlawful condition placed thereon. To so hold was to either ignore the true facts, attempt to read the Petitioner's state of mind at the time, an effort to ignore the constitutional violation aspect of the case, or all of the above.

The minority opinion of the Wyoming Supreme Court more correctly holds at page 2 of the dissent:

"For me this disposition simply fails to recognize the more significant question as to whether this is agency action "contrary to constitutional right," which would be violative of Section 9-4-114(c)(ii)(B), W.S. 1977

(now found at Section 16-3-114(c)(ii)(B), W.S. 1977, Oct. 1982 Rev.). While at one point this issue was subject to debate, it is the law of this case that Edward M. Atchison was entitled to pursue his grievance. Atchison's right to pursue that grievance is protected by the due process clauses of both the state and federal constitutions.1/ As this court said in Bulova Watch Company v. Zale Jewelry Company of Cheyenne, Wyo., 371 P.2d 409, 417 (1962):

> "Article 1, Section 6, Wyoming Constitution, requires that lawful process be employed before a person is deprived of life, liberty or property.

> The liberty envisioned is not alone a liberty of person such as is offended by enslavement, imprisonment or other restraint. It contemplates a person's liberty to do all that is not made unlawful.***"

This language would encompass Atchison's right to pursue his grievance in accordance with the applicable rules."

And, at pages 4-5 of said dissent:

"My thesis is that the right to due process of law is so compelling in our jurisprudence and so essential in our society that we must not suggest that it may be burdened. The right to due process is burdened, however, by a rule

to the effect that when the right is chilled by State action this unlawful conduct will be ignored if it had no impact in fact upon the citizen. Without the right of due process the other constitutional rights and privileges of our citizens, and indeed the rule of law, become illusory. The right to due process is the cornerstone of our other rights and liberties, and it must not be undercut. All the other provisions of our constitutions assuring rights to citizens are of no avail if the right to due process can be circumvented or successfully inhibited."

The chilling effect of the action taken by the director of the department is, at once, obvious, and did in fact

constitute an "impermissible, improper and unconstitutional condition" upon the alleged offer of lateral transfer, in violation of the concepts of such cases as Perry v. Sindermann, 408 U.S. 593, 597, 33 L.Ed.2d 570, 92 S.Ct. 2694, 2697 (1972); Mt. Healthy City School District Board Of Education v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977); and Abood v. Detroit Board of Education, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782, reh. denied 433 U.S. 915, 53 L.Ed.2d 1102, 97 S.Ct. 2989 (1977).

Abood v. Detroit Board of Education, Id. at 97 S.Ct. 1799, a case more directly on point with the case at bar, propounds the following concept and basic right:

" * * * Equally clear is the

proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. * * * "

In accord, is Louisiana ex rel. P.F. Gremillion v. National Association For The Advancement Of Colored People, 366 U.S. 293, 6 L.Ed.2d 301, 81 S.Ct. 1333 (1961), which references Tot v. United States, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, for the same general proposition of law.

" * * * Due process of law is the primary and indispensable foundation of in individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which

a state may exercise. * * * " In Application of Gault, 387 U.S. 1, 18 L.Ed.2d 517, 87 S.Ct. 1428, 1439 (1967).

There can, and must, never be a question, in any respect or by any twist of the imagination, as to the well-established principle that the right to due process of law is a basic and fundamental constitutional right which cannot be circumvented or denied or abridged.

The majority of the Supreme Court of Wyoming, in this case, chose to place this fundamental right and liberty under the table, for whatever reason. This United States Supreme Court must recognize the constitutional rights of the Petitioner herein and resurrect this most sacred principle of freedom.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment and opinion of the Supreme Court of the State of Wyoming.

DATED this 12th day of August, 1983.

Respectfully submitted,

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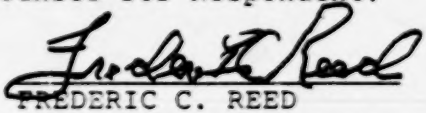
Associate Counsel
For Petitioner

CERTIFICATE OF SERVICE

I, Frederic C. Reed, Counsel For Petitioner herein, hereby certify that on the 12th day of August, 1983, I served copies of the foregoing Petition For Writ Of Certiorari upon Respondent herein, the Career Service Council of the State of Wyoming, by hand-delivering three (3) copies thereof to the Office of the Attorney General, State of Wyoming, Capitol Building, Cheyenne, Wyoming 82002, Counsel for Respondent.



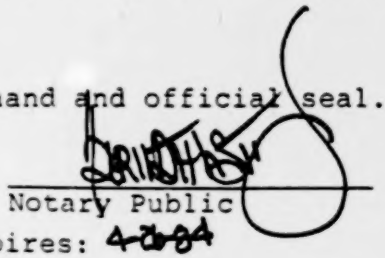
FREDERIC C. REED
Counsel for Petitioner

STATE OF WYOMING)
)SS:
COUNTY OF LARAMIE)

The foregoing Certificate of Service was acknowledged before me this

12th day of August, 1982, by FREDERIC C. REED.

Witness my hand and official seal.



Notary Public

My Commission Expires: 4-2-84

APPENDIX

CONTENTS

I. Opinion Of The Supreme Court Of Wyoming

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1983

May 17, 1983

EDWARD M. ATCHISON, Appellant (Petitioner), v. THE CAREER SERVICE COUNCIL OF THE STATE OF WYOMING, Appellee (Respondent).	)	No. 5714

Appeal from the District Court of Laramie County, the Honorable Alan B. Johnson, Judge.

Bert T. Ahlstrom, Jr., Cheyenne, for appellant.

Steven F. Freudenthal, Attorney General, and Bruce A. Salzburg, Senior Assistant Attorney General, Cheyenne, for appellee.

Before RAPER, THOMAS, ROSE,* and BROWN, J.J., and HANSCUM, D.J.

HANSCUM, D.J., delivered the opinion of the court. THOMAS, J., filed a dissenting opinion, in which ROSE, J., joined.

*Chief Justice at time of oral argument.

HANSCUM, District Judge.

Appellant Edward M. Atchison was a probationary employee of the Department of Health and Social Services (Department). The Department advised appellant that he would have to vacate his position. After he did so, he filed an appeal with appellee Career Service Council (CSC). CSC ruled that appellant's appeal should be dismissed on several grounds, one of which was that appellant had no right to an appeal. This appellant filed a petition for review from this first ruling to the district court, which reversed the CSC and remanded the case for hearing. No party appealed from this district court order. After the hearing, CSC issued an order affirming the Department's

action. Appellant again petitioned for review in the district court, which affirmed CSC's order. Appellant is now appealing from the district court order affirming CSC's decision to uphold appellant's separation and dismissal by the Department.

Appellant contends that CSC erred when it upheld the Department's actions, and that the district court erred when it affirmed CSC, in that there was no substantial evidence to support CSC's actions. Specifically, he argues that: (1) CSC erred in finding that the minimum qualifications which were developed for the position of developmental disabilities state program supervisor were lawful; (2) CSC erred in finding that appellant did not qualify for the position; (3) CSC erred in

finding that there was an offer of a lateral transfer under applicable personnel rules; and (4) CSC erred in finding that appellant's termination was a nullity.

We affirm.

FACTS OF THE CASE

Edward M. Atchison was employed on November 1, 1977, as a developmental disabilities state program consultant by the Department. At the time appellant interviewed for the consultant position, he was advised that the consultant position would be restructured into two positions to make one position (i.e., the position responsible for adult programs) supervisory over the position which had been allocated for pre-school programs.

Sometime before December 1, 1977,

a position description questionnaire was prepared by appellant and his supervisor to reallocate the consultant position held by appellant to a new position of developmental disabilities state program supervisor. Appellant completed an employee qualification statement to the Personnel Division within the Department of Administration and Fiscal Control, which was responsible for reallocating the position and setting minimum qualifications.

On February 2, 1978, the director of the Department of Health and Social Services advised appellant that he failed to qualify for the supervisor position and notified appellant that the Personnel Rules required him to vacate his position within 30 days. On the same day, the Personnel Division

notified appellant that he failed to qualify for the supervisor position under the minimum standards which were established.

On February 3, 1978, appellant filed a grievance with the director of the Department and continued working as a consultant until March 3, 1978, which was the date of his separation as set forth in the February 2, 1978, letter. On or about February 23, 1978, appellant met with the director of the Department at which time the director asked appellant to remain in the Department and to accept the second supervised position in the developmental disabilities unit on the condition that appellant qualify for the second position for which the minimum qualifications had not, at that time,

been established, and on the further condition that appellant abandon his grievance as to his failure to qualify for the supervisor position. Appellant refused the offer.

Appellant was paid from the date of his separation on March 3, 1978, until June 19, 1978, at which time he was terminated from state employment for performance which was "less than satisfactory." For reasons which will be made more apparent in this opinion, this termination, having been ruled a nullity, is not significant to a resolution of the issues in this appeal.

ISSUES ON APPEAL

The issues in this appeal are:

1. Were the minimum qualifications established for the position

of developmental disabilities state program supervisor "unlawful" under the standards for judicial review by district courts and this court, under § 9-4-114(c), W.S.1977, Cum.Supp. 1982, and §9-4-115, W.S.1977?

2. Were CSC's findings and conclusions that appellant did not qualify for the reallocated position of developmental disabilities state program supervisor "unlawful" under the standards for judicial review by district courts and this court, under §§9-4-1149(c) and 9-4-115, supra?

3. Were CSC's findings and conclusions that there was an offer of lateral transfer, as

mandated by the Personnel Rules, "unlawful" under the standards for judicial review by district courts and this court, under §§ 9-4-114(c) and 9-4-115, supra?

4. Were CSC's findings and conclusions that appellant's termination on June 19, 1978, was a nullity "unlawful" under the standards for judicial review by district courts and this court, under §§ 9-4-1149(c) and 9-4-115, supra?

The district court and this court must determine whether CSC's findings, conclusions and order were supported by substantial evidence, thus rendering CSC's action lawful and not subject to

being set aside by judicial review. The ultimate legal issue in this appeal is whether any of the agency actions with respect to appellant constitute unlawful actions under any of the subparagraphs of §9-4-114(c)(ii), supra, such that the agency action must be set aside?

STANDARD OF REVIEW

The legislature has determined the scope of review of a final order of an administrative agency by the district court. Section 9-4-114(c), supra.

This court has previously determined the scope of its own review of the district court's action. We will review the agency action as though the appeal were directly to this court from the agency. This court is governed by the same rules of review as was the district court. Board of Trustees of

School District No. 4, Big Horn County v. Colwell, Wyo., 611 P.2d 427 (1980), and cases cited thereunder. See also Town of Pine Bluffs v. State Board of Control of State of Wyoming, Wyo. 647 P2d 1365 (1982).

THE ESTABLISHMENT OF MINIMUM QUALIFICATIONS AND APPELLANT'S QUALIFICATIONS

It is clear that the Personnel Division of the Department of Administration and Fiscal Control is assigned the responsibility to determine minimum qualifications for state positions. Moreover, it is clear that the minimum qualifications for the supervisor position were adopted in accordance with the Personnel Rules (Chapter IX and X). The ostensible purpose for assigning the responsibility for all state positions to the

centralized Department of Administration and Fiscal control is to consider the state system as a whole and to achieve uniformity and fairness in salaries across state government. While input from appellant's supervisors in the Department of Health and Social Services is to be considered by the Personnel Division, it is the Personnel Division which is vested with the ultimate responsibility and obligation to prescribe the minimum requirements for the position. The procedure for reallocating a job position is set forth in the Personnel Rules (at pages 34, 41-42, and 45). A review of the record on appeal disclosed that the applicable procedures were followed.

The critical difference in the reallocated position was the

requirement of three years' experience as a consultant, the position which appellant originally assumed. Concededly, appellant did not qualify as to the minimum prescribed experience requirement. The question of whether appellant has "other related * * * experience" as an alternative to the minimum experience requirement is a matter within the discretion of the agency. The testimony of Richard Paul Hodapp, Personnel Supervisor, Selection Supervisor for the Personnel Division of the Department of Administration and Fiscal Control, describes the procedures utilized in determining whether appellant qualified for the reallocated position. A review of the record discloses no basis to disagree with the agency determination that the appellant

did not qualify. This court will not substitute its judgment on these matters for that of the administrative agency, nor will this court perform duties assigned by law to administrative boards. McGuire v. McGuire, Wyo., 608 P.2d 1278 (1980).

It has also been held that in the absence of fraud or illegal action, this court should not reverse the final order of CSC in which the qualifications, as established by the Personnel Division, were approved. Toavs v. State ex rel. Real Estate Commission, Wyo., 635 P.2d 1172 (1981).

LAWFULNESS OF MINIMUM QUALIFICATIONS

Appellant next contends that the minimum qualifications for the position of the reallocated developmental disabilities state program supervisor

"were absurd, /and/ bore no reasonable relation to the position." Such a contention is not a basis to set aside agency action and is limited by §9-4-114(c), supra. Nowhere in this statute is absurdity a basis or ground for setting aside an agency action.

Assuming, however, for purposes of argument that by this contention appellant means that the minimum qualifications constitute unlawful agency action in that they are "/a/rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," §9-4-1149 (c)(ii)(A), supra, then it is necessary to determine whether the minimum qualifications may be characterized as such.

The minimum qualifications for the

supervisor position were as follows:

> "Completion of college coursework at the master's level in special education, clinical psychology or other closely related field, PLUS three years of full time work experience as a developmental disabilities program consultant or in a similar role in a developmental disabilities program; other related training and experience may be evaluated for relevance for partial

substitution of the
required training and
experience." (Emphasis
in original.)

Appellant contends that no one in Wyoming could have qualified for the new position, thereby drawing the inference that the setting of the prescribed minimum qualifications was, on its face, arbitrary or, as appellant contends, "absurd."

Richard Hodapp's testimony explained the procedure utilized in prescribing minimum qualifications for positions in state government which are reallocated. Mr. Hodapp set forth a general format that is followed:

"Q. /BY MR. SALZBURG/
How are minimum
qualifications prepared?

"A. We or whoever is writing them has a general format that we follow. We do a thorough job analysis which is those written minimum qualifications. We will take the PDQ which is the principal job analysis tool and review it thoroughly, both the incumbent section and the supervisor section, to determine what knowledge and skills and types of abilities and experiences and education might be required to perform that job.

"We continue on from

there. We will review the class structure. We will review other classes related to the class that we are reviewing to determine what the minimum qualifications are for similar or related classifications to insure uniformity in classifications, to determine what needs might arise within the organization.

"If necessary we may contact experts in the area. We may talk to supervisors, we may talk to others related to this area, but ask for their

opinions we may review if necessary, we may review different documents like the Dictionary of Occupational Titles to get a better feel for the type of position, type of classification.

"Q. So, how long on the average does it take you to prepare minimum qualifications?

"A. On the average I would say three hours.

"Q. Are you familiar with the Uniform Guidelines on Employee Selection Procedure?

"A. Yes, I am.

"Q. Are you familiar

with Professional Standards for Selection and Validation?

"A. Yes, I am.

"Q. Are those two reference materials that you might use on a day-to-day basis?

"A. They are reference materials. It is something you read and must know. It is nothing that are standards, professional standards against which you perform your work duties. You don't refer to them as such. It is something that you learn, you read, you learn, you memorize

even, and you just make sure that you don't violate any of the principles or standards set forth.

"Q. As a general rule, would you, in your job try to comply with the principles and standards set forth in those two documents?

"A. Definitely, definitely.

"Q. Was the procedure you just outlined followed in the case of reallocation of the adult DD consultant to DD supervisor in Ed Atchison's case?

"A. Yes, it was."

It is clear that CSC, in determining the issues at the administrative level, recognized that the Personnel Division had the authority and responsibility to perform certain duties. As Mr. Hodapp's testimony indicates, the Personnel Division performs those duties in accordance with a prescribed format. It is not the function of the court to perform duties assigned by law to administrative agencies. McGuire v. McGuire, supra. If this court were to set aside the minimum qualifications, it would be in effect prescribing new minimum qualifications, thus performing a task assigned to state agencies. District courts and this court do not have the authority to perform those duties.

Laramie River Conservation Council v. Industrial Siting Council, Wyo., 588 P.2d 1241 (1978); see also 14 Land & Water L.Rev. 607 (1979). Neither the district court nor this court on appeal may substitute its judgment for that of the administrative agency. Shenefield v. Sheridan County School District No. 1, Wyo., 544 P.2d 870 (1976).

RIGHT TO A LATERAL TRANSFER

Appellant next directs attention to the rights available to state employees when their positions are reallocated and the employee who previously held the former position does not meet the minimum qualifications for the position, as reallocated. As previously stated, appellant was notified that he did not qualify for the position as reallocated. The notice provided that appellant

"shall not be allowed to remain in the position for more than thirty (30) days" after February 2, 1978, which was the date he received the written notice from the Personnel Division.

Both of the parties to this appeal agree that at the time of this action, Chapter XIV, 3.a. of the Personnel Rules provided that when a reduction in force occurred, "employees in the affected positions shall, if possible, be given a transfer or an involuntary reappointment to another position in the agency." (Emphasis added.) The question arises as to whether it was possible for appellant to be transferred.

For a transfer to another position to have been possible, there were two prerequisites (1) another position

within the agency must have been available (Personnel Rules, Chapter VII, 6); and (2) the candidate must have met the minimum qualifications of that position (Id., at 1.a.). The record on appeal demonstrates that there were no other positions available in the Department except the supervised position in the developmental disabilities unit. Insofar as appellant's qualification for the supervised position is concerned, appellant at the February 23, 1978, meeting with the director of the Department did not know whether he would qualify, because the position qualifications for the supervised position had not yet been prescribed by the Personnel Division. A decision as to whether another position was

available for which appellant qualified could not have been made until the minimum qualifications for the supervised position had been prescribed by the Personnel Division.

The fundamental question, therefore, is whether, under the circumstances, appellant was extended a bona fide offer of lateral transfer as mandated by the Personnel Rules. If a bona fide offer of lateral transfer was not made, then appellant may be quite correct in arguing that his refusal to accept the lateral transfer was justified. In addressing this issue in the next section of this opinion, this court has reviewed the record on appeal and the letter opinion dated April 13, 1982, from the district court. This court finds that the logic and result

reached by the district court is persuasive; thus, the following section places great reliance on the findings of the district court as embodied in the letter opinion.

RIGHT TO LATERAL TRANSFER WAS SUBSTANTIALLY AFFORDED TO THE APPELLANT

This is the most troublesome issue on appeal. As previously noted, appellant was given a conditional offer for lateral transfer. The offer was conditioned on his qualifying for the position and abandoning his grievance relative to his failure to receive the supervisor position. The critical factual question in resolving this issue on appeal is why appellant refused the transfer.

It is indisputable that the director of the Department placed an

impermissible, improper and unconstitutional condition upon the lateral transfer; namely, appellant was required to abandon his challenge to the determination that he did not qualify for the supervisor position. That this condition was improper was recognized by CSC itself. It has also been recognized under the holding of Vitarelli v. Seaton, Secretary of the Interior, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959). This court recognizes the general principle that conditions precedent are not favored in the law; especially where the intent is to contravene established statutory laws or regulations. Cheyenne Dodge, Inc. v. Reynolds and Reynolds Company, Wyo., 613 P.2d 1234 (1980); Tri-County Electric Association, Inc. v. City of Gillette,

Wyo., 584 P.2d 995 (1978).

The critical question in resolving this issue is whether appellant's refusal of the lateral transfer was the product of the impermissible condition (i.e., the abandoning of the grievance) or whether it was related to the permissible condition (i.e., that appellant must qualify for the position). The factual issue was resolved by CSC when it found that the abandonment of the grievance, though an improper condition, was not the reason for appellant's refusal to accept the offer of the lateral transfer. It was appellant's doubt that he would qualify for the position that caused him not to accept the offer. In fact, CSC specifically found that appellant refused the offer of lateral transfer

because there were no guarantees that he would qualify for the supervisor position. The critical portion of the transcript, wherein appellant testified on this subject, reads as follows:

> "Q. /BY MR. SALZBURG/ Why didn't you say, 'I will accept the position and if I qualify and if you hire me I will drop my grievance'?
> "Why didn't you say that?
> "A. Perhaps that was an alternative that I didn't perceive at that time.
> "Q. You said that the only problem with the position was you were afraid you weren't going

to qualify for it or you were somehow not going to get it, right?

"A. That's correct.

"Q. Why couldn't you guarantee getting it before you complied with his request?

"A. That's a question -- this should be directed towards Mr. Nelson in the fact that I don't believe he would have guaranteed me that position."

Therefore, by virtue of the testimony adduced from the appellant himself, it is apparent that the improper condition was not the cause of appellant's failure to get the transfer; the cause of appellant's failure to

obtain the transfer and his refusal thereof was his unwillingness to gamble as to whether he would qualify for the new position once the minimum qualifications had been prescribed.

The question of causation or the nexus between an allegedly improper condition and the action taken by the agency is decisive in light of § 9-4-114(c)(ii)(D), supra. If CSC would have found that appellant's refusal of the lateral transfer was caused by the impermissible condition, and yet sustained appellant's separation from state government, then CSC's action would have been illegal because the action was "/w/ithout observance of procedure required by law." Id. To the contrary, CSC found no nexus between the attachment of the impermissible

condition and appellant's refusal to get the lateral transfer. This court finds that the administrative agency's finding in this regard is supported by substantial evidence; therefore, there is no illegal agency action. Board of Trustees of School District No. 4, Big Horn County v. Colwell, supra; Clements v. Board of Trustees of Sheridan County School District No. 2, in County of Sheridan, Wyo., 585 P.2d 197 (1978).

SUBSEQUENT TERMINATION
WAS A NULLITY

CSC concluded that the attempted dismissal and termination of appellant by the June 19, 1978, letter was a nullity and of no force and effect. If, as a probationary employee, appellant was properly separated from service on March 3, 1978, as this court has found,

then the subsequent letter of termination would have no meaning or consequence.

While it is still bothersome that the state elected to pay appellant from the time of his separation on March 3, 1978, until the letter of termination was issued on June 19, 1978, this unresolved puzzle is not germane to a determination of this appeal. Suffice it to say that this court cannot reach the issue of the propriety of the later termination if this court affirms the process under which the agency caused appellant to be separated on March 3, 1978.

CONCLUSION

In analyzing the substantial evidence issue raised by appellant, the reviewing court must look at the entire

record to determine whether substantial evidence exists supporting the agency action. Toavs v. State ex rel. Real Estate Commission, supra. The substantial evidence rule as enunciated by this court is well known. Sage Club, Inc. v. Employment Security Commission of Wyoming, Wyo., 601 P.2d 1306 (1979); Clements v. Board of Trustees of Sheridan County School District No. 2, in County of Sheridan, supra; Laramie River Conservation Council v. Industrial Siting Council, supra; Shenefield v. Sheridan County School District No. 1, supra; Monahan v. Board of Trustees of Elementary School District No. 9, County of Fremont, Wyo., 486 P.2d 235 (1971).

In the previous sections of this opinion, the court has concluded that the agency action was not unlawful

under any of the subsections of the Wyoming Administrative Procedure Act which govern judicial review of agency action. This court upholds the agency action, as did the district court.

It is apparent from the decision and opinion of the district court that it found substantial evidence to support the agency actions which resulted in the separation of appellant from state service.

Affirmed.

THOMAS, Justice, dissenting, with whom ROSE, Justice, joins.

I have tried very hard to accept the resolution of this case in accordance with the views expressed in the majority opinion, but I am unable to do so. It is my view that we are confronted with administrative action which was contrary to a significant constitutional right of Edward M. Atchison, and that we should hold that agency action unlawful and set it aside. It even may be that I am unduly expanding upon the ambit of this appeal, but my concern over a constitutional right which I regard as fundamental compels me to do so.

My point of departure is language appearing on page 8 of the majority opinion. It there is said:

"It is indisputable that the director of the Department placed an impermissible, improper and unconstitutional condition upon the lateral transfer; namely, appellant was required to abandon his challenge to the determination that he did not qualify for the supervisor position. * * * "

The language quoted above was presaged by the following comment found in the statement of facts at page 2 of the majority opinion:

" * * * On or about February 23, 1978, appellant met with the

director of the Department at which time the director asked appellant to remain in the Department and to accept the second supervised position in the developmental disabilities unit on the condition that appellant qualify for the second position for which the minimum qualifications had not, at that time, been established, and on the further condition that appellant abandon his grievance as to his failure to qualify for the supervisor position.

* * * " (Emphasis added.)

The majority of the court choose to treat with this as an issue with respect to whether the agency observed the procedure required by law, which it is mandated to do by §9-4-114 (c)(ii)(D), W.S.1977 (now found at §16-3-114 (c)(ii)(D), W.S.1977 Oct. 1982 Rev.). That procedure required the extension of an opportunity for lateral transfer, if possible. The majority then concludes that since as a matter of fact the record demonstrates there was no nexus between the unlawful condition and Atchison's rejection of the offer of lateral transfer the unlawful condition may be disregarded. The majority holds that the court is not confronted with agency action, findings, or conclusions

which are "without observance of procedure required by law" because Atchison said he was not subjectively affected by the unlawful condition.

For me this disposition simply fails to recognize the more significant question as to whether this is agency action "contrary to constitutional right," which would be violative of § 9-4-114 (c)(ii)(B), W.S.1977 (now found at §16-3-114 (c)(ii)(B), W.S. 1977, Oct. 1982 Rev.). While at one point this issue was subject to debate, it is the law of this case that Edward M. Atchison was entitled to pursue his grievance. Atchison's right to pursue that grievance is protected by the due process clauses of both the state and federal constitutions. As this court said in Bulova Watch Company v. Zale

Jewelry Company of Cheyenne, Wyo., 371 P.2d 409, 417 (1962):

> "Article 1, §6, Wyoming Constitution, requires that lawful process be employed before a person is deprived of life, liberty or property. The liberty envisioned is not alone a liberty of person such as is offended by enslavement, imprisonment or other restraint. It contemplates a person's liberty to do all that is not made unlawful. * * *"

This language would encompass Atchison's right to pursue his grievance in accordance with the applicable rules.

The chilling effect upon Atchison's exercise of his constitutional right to pursue his grievance of the "impermissible, improper and unconstitutional condition upon the lateral transfer; namely, appellant was required to abandon his challenge to the determination that he did not qualify for the supervisor position" is obvious. It becomes the paramount consideration in this case. In other contexts the Supreme Court of the United States has spoken against the chilling effect of certain kinds of State action. In Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), the court said:

> "For at least a quarter-century, this Court has made clear

that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person

> because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible."

Of similar effect is Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In Abood v. Detroit Board of Education, 431 U.S. 209, 97

S.Ct. 1782, 1799, 52 L.Ed.2d 261, reh. denied 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977), the following language is found:

> " * * * Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. * * * "

In Louisiana ex rel. P. F. Gremillion v. National Association For The Advancement of Colored People, 366 U.S. 293, 81 S.Ct. 1333, 1335, 6 L.Ed.2d 301 (1961), the Court stated with respect to the right of due process:

> "It is not consonant

> with due process to require a person to swear to a fact that he cannot be expected to know (cf. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519) or alternatively to refrain from a wholly lawful activity."

As a matter of public policy, the State of Wyoming cannot accept in any form agency action that is so obviously designed to inhibit the exercise of a constitutional right. To prevent such impermissible, improper and unconstitutional conditions from being attached to the exercise of their rights by citizens this court should hold unlawful and set aside the agency

action which entails such a chilling effect. Otherwise, who could be expected to resist the temptation to condition agency action required by law upon the relinquishment of constitutional rights? If the offeree succumbed the matter never would be tested, and if he did not there always would be the opportunity to protect such unlawful conduct by asserting that it had no subjective impact upon the citizen's decision.

It is for this reason that the violation of subsection (B) of our statute cannot be justified in the same manner as that in which the majority opinion has attempted to justify the asserted violation of subsection (D) of the statute. The right to due process is a fundamental constitutional right.

In Application of Gault, 387 U.S. 1, 87 S.Ct. 1428, 1439, 18 L.Ed.2d 517 (1967), the Supreme Court discusses the primacy of due process in this language:

> " * * * Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which a state may exercise. * * * "

This right cannot be burdened with a requirement that a nexus be shown between the condition of relinquishment of the right in order to accept the State's offer and the citizen's

decision in refusing the offer. This does, however, appear to be the thrust of the majority opinion in this case. The court is saying, in effect, that if the employee expresses a subjective state of mind evidencing that the unlawful condition had no impact upon his decision in the circumstances the court then will ignore the constitutional violation.

My thesis is that the right to due process of law is so compelling in our jurisprudence and so essential in our society that we must not suggest that it may be burdened. The right to due process is burdened, however, by a rule to the effect that when the right is chilled by State action this unlawful conduct will be ignored if it had no impact in fact upon the citizen.

Without the right of due process the other constitutional rights and privileges of our citizens, and indeed the rule of law, become illusory. The right to due process is the cornerstone of our other rights and liberties, and it must not be undercut. All the other provisions of our constitutions assuring rights to citizens are of no avail if the right to due process can be circumvented or successfully inhibited.

I, therefore, would set aside the agency action in this case on the ground that it is unlawful because it was taken contrary to Edward M. Atchison's constitutional right to due process of law. The potential chilling effect of the unlawful condition justifies that result for me without regard to its actual effect. The only remaining task

should be that of fashioning the appropriate remedy.

II. Order And Letter Opinion Of The Lower Court

STATE OF WYOMING)
)SS:
COUNTY OF LARAMIE)

IN THE DISTRICT COURT

FIRST JUDICIAL DISTRICT

EDWARD M. ATCHISON, Petitioner,	)	
-vs-	)	Doc. 95 No. 408
THE CAREER SERVICES COUNCIL OF THE STATE OF WYOMING, Respondent.	)	

ORDER AFFIRMING ADMINISTRATIVE ACTION

THIS MATTER having come before the Court on oral argument on April 2, 1982, Petitioner appearing by and through his attorney, Mr. Bert T. Ahlstrom, Jr. and Mr. Bruce A. Salzburg appearing on behalf of Respondent, the Court having reviewed the file and after hearing oral argument and reviewing the

briefs finds as follows:

1. That for the reasons set forth in the letter opinion dated April 13, 1982, the Career Services Council should be affirmed in its action.

2. That the letter opinion be incorporated by reference in this order.

WHEREFORE IT IS HEREBY ORDERED:

1. That the action of the Career Services Council be and is hereby affirmed.

DONE in Open Court this 7th day of May, 1982.

/s/Alan B. Johnson
JUDGE

APPROVED AS TO FORM:

/s/Bert T. Ahlstrom, Jr.
Bert T. Ahlstrom
Attorney for Edward M. Atchison

April 13, 1982

Mr. Bert T. Ahlstrom, Jr.
Attorney at Law
P. O. Box 133
Cheyenne, Wyoming 82001

Mr. Bruce A. Salzburg
Senior Assistant Attorney General
123 State Capitol Building
Cheyenne, Wyoming 82002

Re: Atchison v. Career Service Council, Doc. 95, No. 408, First Judicial District

Dear Counsel:

The above captioned matter came before the Court on Friday, April 2, 1982, for oral argument. The Court has completed its administrative review of the proceedings before the Career Service Council of the State of Wyoming in its case, Docket No. 78-01. The proceedings before the Career Service Council occurred on January 17, 1981, and culminated in Findings of Fact,

Conclusions of Law, and Order dated July 13, 1981. That Order affirmed the action of the Personnel Division in determining that the Petitioner, Edward M. Atchison, did not meet the ninimum qualifications for the position of Developmental Disabilities State Program Supervisor and affirmed the separation of the petitioner pursuant to the Rules and Regulations of the Personnel Division that made the petitioner subject to a reduction in force (RIF) from the Department of Health and Social Services of the State of Wyoming. The parties have agreed to the statement of the case and statement of the facts leading up to this matter commencing on Page 2 of the brief of petitioner. The standards for judicial review of administrative actions in effect at the

time of the hearing in this matter in January, 1981, is found at Sec. 9-4-114(c) W.S. as amended in 1979:

> "To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall: ***

(ii) hold unlawful and set aside agency action, findings and conclusions found to be:

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or lacking statutory right;

(D) without observance of procedure required by law; or

(E) unsupported by substantial evidence in a

case reviewed on the record of an agency hearing provided by statute."

The petitioner has made seven separate arguments, seeking to have the Council's Order reversed and seeking reinstatement either to petitioner's former position of consultant or to the new position of supervisor with full rights, privileges and authority and full back pay. In making his arguments to the Court, the petitioner goes beyond the record of the proceedings before the Career Service Council and submits in Argument No. 5 that the Council erred in holding that the termination on June 19, 1978, was a nullity. Further, petitioner contends that the dismissal notice of June 19, 1978, did not comply with the notice requirements of the Personnel Rules, violating

constitutional rights and resulting in no termination whatsoever. In the Council's Conclusion No. 7, it is determined that the dismissal of the petitioner as a probationary employee on June 19, 1978, was a nullity; and the underlying findings of fact specifically addressing that issue are Nos. 29, 30, 31 and 32.

The respondent's arguments compress those of the petitioner to five in number and respondent seeks to contain the arguments to those areas authorized for judicial review pursuant to Wyoming statute. The purpose of the state classification system for job positions is found in the testimony of Richard Paul Hodapp, Personnel Supervisor,

Selection Supervisor for the State of Wyoming, who testified on direct examination in Vol. 1 of the transcript at Page 277 as follows:

"Q. What does salary of a position have to do with duties and responsibilities in our classification system?

A. Well, that's the primary reason we have salaries. The salaries reflect the level of responsibilities, span level and control, I believe is the term that the classification is used based on the time of task, level of tasks required, experience to perform the duties, they determine the compensation range for the

class.

Q. Do you know what the Jacob Study is?

A. I believe it is a catch-all name for the classification which we are currently working with.

Q. Do you know what the purpose of implementing the Jacob Study was?

A. I believe that one of the purposes was to assure uniformity and consistency across positions in the state government to be sure that everybody was paid fairly and uniformly throughout the state system."

The procedures for reallocating a job position as occurred in this case

are set forth in the Wyoming Personnel Rules at Pages 34, 41-42, and 45. The procedure is further explained in the testimony of Mr. Hodapp, Vol. 1 of the transcript, Pages 261-267; and the respondent further describes these procedures at Pages 17 and 18 of respondent's brief. In this case plans made prior to the hiring of the petitioner in the Fall of 1977 to change the structure of the positions within developmental disabilities were acted upon shortly after the hiring of the petitioner as a Developmental Disability State Program Consultant on November 1, 1977. As set forth on Page 8 of the petitioner's brief, different classifications and minimum qualifications were established within

the Personnel Division for the new position known as "Developmental Disability State Program Supervisor." That position carried higher pay and the individual hired would have the responsibility over both the adult developmental disabilities program and a similar program for children. There appears to be no issue but that the method or procedures for a reallocation of the position were accomplished in accordance with the Wyoming Personnel Rules. It was in accordance with those rules that the qualifications were established, the petitioner was evaluated by the Personnel Division and found not to meet the minimum qualifications for the reallocated position. The minimum qualifications for each position are admittedly quite

similar except for the critical difference that the supervisor must have held down a consultant's position for a period of three years; and this petitioner, who was qualified only two months before for hiring as a consultant, obviously did not qualify. In fact, the petitioner had been hired for his original position on the basis that his experience in a different field was closely enough related as to qualify him for state service in the judgment of the Personnel Division. The petitioner suggests by his argument that perhaps the minimum qualifications of the supervisory position should have been tailored so that he, as the incumbent in developmental disabilities could fill that position. As noted on Page 289 of the transcript, Mr. Hodapp testifies:

"A. It doesn't matter if it is incumbent's position or not, frankly, you know. What we are concerned about is writing minimum qualifications which fit into the entire classification system."

In petitioner's second argument, the petitioner argues that it was "absurd" for employees in the Personnel Division to determine minimum qualifications, although that has been the system adopted within the State of Wyoming as noted in the Wyoming Personnel Rules, Chapters IX and X. Because the purpose of the classification system is to consider the entire system and to achieve uniformity in salaries across the state, the input

of Dr. Rogers, the petitioner's supervisor, or W. Don Nelson, were only factors to be considered by the Personnel Division. Finally, as to this argument, the petitioner, looking back, contends that difficulty was encountered by the state in filling the new position. Hindsight in this instance does not justify scrapping the classification system. As noted at page 266 in the testimony of Mr. Hodapp, the supervisors are contacted concerning the classification; and in fact, the supervisor was consulted as noted on Page 223.

The petitioner next directs attention to the rights available to an employee of the State of Wyoming when their position is reallocated and the

employee does NOT meet the minimum qualifications for the reallocated position. Petitioner was notified by W. Don Nelson that he did not qualify for the new position and that he "shall not be allowed to remain in the position for more than thirty (30) days after receipt of written notice from the Personnel Division. . ." All parties agree that at the time of this action Chapter XIV, Sec. 3A of the Personnel Rules provided that when a reduction in force occurs, employees shall be given a transfer within the Department of Health and Social Services. It is at this point that the petitioner diverges factually from the respondent. The Council found at Page 8, Finding 24, that on February 23, 1978, the petitioner met with W. Don

Nelson and at that meeting the petitioner was asked to remain in the department and accept the second supervised position in the DD program. Pursuant to Personnel Rules, however, the petitioner would have to qualify for that position in the usual manner. Further, Nelson asked that petitioner abandon his challenge to the determination that he did not qualify for the supervisory position. At oral agument the petitioner alleged that the reason for refusing this offer was due to the request of Mr. Nelson that the petitioner abandon his grievance. The Council found that the reason for refusing the offer was that Mr. Nelson could not assure the petitioner that the second position would be given to him,

based on his qualifications. In his testimony, the petitioner acknowledged the conversation with Mr. Nelson, beginning at Page 155 of the transcript. At Page 158 the petitioner was asked:

"Q. Why didn't you say, 'I will accept the position and if I qualify and if you hire me I will drop my grievance'? Why didn't you say that?

A. Perhaps that was an alternative that I didn't perceive at that time.

Q. You said that the only problem with the position was you were afraid you weren't going to qualify for it or you were somehow not going to get it, right?

A. That's correct.

Q. Why couldn't you guarantee getting it before you complied with his request?

A. That's a question -- this should be directed towards Mr. Nelson in the fact that I don't believe he would have guaranteed me that position."

At Page 70, the petitioner states that Mr. Nelson did not guarantee that he should have the position. Beginning at Page 72, petitioner states:

"Again, that was the -- there was no guarantee that I have that position. This I can remember it taking place as if it was today, but he was telling me that they needed an individual with the experience

that I had had and a rapport that I had established. He felt that it would be stupid to throw an individual away who had been in a program for four months.

He desired that I stay in the program, but again, only if I had given up my legal responsibility and also the fact that there was no guarantee of getting that job. It certainly didn't sound like an attractive offer to me."

On Page 73, the petitioner notes that he rejected the opportunity to seek lateral transfer to the other position within the DD program. It is petitioner's position that the offer was

too "feeble"; and that the condition with regard to withdrawal of legal rights was improper. Both the Council and the respondent now agree that the condition was not proper; but disagree with the Petitioner that the imposition of the condition was the cause of rejection of the opportunity for consideration for lateral transfer. That opportunity was never denied to the petitioner, yet he chose not to submit his qualifications for examination by the Personnel Department, which was a legal right that he possessed. The petitioner argues that the offer of a second position was really no offer at all, and this writer generally agrees; however, the fact of the offer is of no great significance in this matter, since

the supervisor, in this case Mr. Nelson, is not in a position to make guaranteed offers of employment to individuals, absent determination that the employee meets minimum qualifications and there is compliance with the Personnel Rules. See, Wyoming Personnel Rules, Chapter VII, Sec. 1. The petitioner chose to permit the reduction in force to proceed, thus separating him from his office at the end of the thirty-day period in order to pursue his perceived grievance remedies. He did not apply for the unfilled position in the DD program, his qualifications were not reviewed by the Personnel Division, and lateral transfer was thus thwarted by the petitioner's inaction.

While conceding that the procedure in terms of the Wyoming Personnel Rules by which the reduction in force affecting the petitioner was correctly followed, the petitioner nevertheless contends that the Council erred in finding that the petitioner was separated from service by virtue of a reduction in force on March 3, 1978. The basis for this argument is the inconsistent position taken by the state in paying the petitioner although he had vacated his office and then later sending a letter to him under advice of its Attorney General. This was a letter of termination for unsatisfactory work dated June 19, 1978. Under Vitarelli v. Seaton, et al., 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959), the procedure of the letter of June 19, 1978, was

found by the Council to have been inappropriate. The Council found at Finding 30 as follows:

> "The reasons that this termination was made were primarily related to the inability of the department to hire for the two DD positions so long as petitioner's claim to the supervisor position was pending /Tr. Vol. II, p. 338; Tr. Vol. I, pp. 226-227/ . . ."

The Council correctly concluded at Page 16 of its Findings of Fact and Conclusions of Law that the attempted dismissal of June 19, 1978, was a nullity.

Based upon the above, it is the conclusion of the Court that the

decision of the Career Service Council should be affirmed. The Council correctly concluded that the petitioner did not qualify for the supervisor position within the DD program, and that the petitioner did not pursue lateral transfer under the Personnel Rules and thus suffered separation due to a reduction in force as set forth in the Wyoming Personnel Rules. Mr. Salzburg will prepare the order for signature by the Court to be approved as to form only by Mr. Ahlstrom.

Yours very truly,

/s/
Alan B. Johnson
District Judge

ABJ/bb

III. Findings, Conclusions And Order Of Respondent Career Service Council Of The State Of Wyoming

BEFORE THE
WYOMING CAREER SERVICES COUNCIL

In re:	)	
Edward M.	)	Docket No. 78-01
Atchison	)	

FINDINGS OF FACT,

CONCLUSIONS OF LAW

AND ORDER

Pursuant to Notice duly given to all parties in interest, this matter came on regularly to hearing on the 16th day of January, 1981, at the hour of 9:00 a.m., in the Conference Room of the Department of Administration and Fiscal Control, Officer Samuel A. Soule', presiding with council members Glen Gorman and James A. Zaring in attendance. Also in attendance was Pete J. Kithas, supervisor, Career Services Section, Department of Administration and Fiscal Control.

Appearance for the parties hereto were:

For the Petitioner Edward M. Atchison	Bert Ahlstrom Ahlstrom & VanCourt The Teton Building P. O. Box 133 1807 Capitol Avenue Cheyenne, WY 82001
For the Respondent State of Wyoming	Bruce A. Salzburg Senior Assistant Attorney General State of Wyoming 123 Capitol Building Cheyenne, WY 82002

Based upon the testimony taken and evidence addressed herein, the Career Services Council enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Petitioner, Edward M. Atchison, was hired by the Wyoming Department of Health and Social Services as a Developmental Disabilities State Program Consultant (Consultant) /Tr. Vol. I, p. 347 on November 1, 1977 /Id., p. 39; Petitioner's Ex. #147.

2. The minimum qualifications for the Consultant position were:

> Completion of course work at the Master's degree level in clinical psychology, vocational rehabilitation or

closely-related field, plus three (3) years of work experience as a practitioner or manager in the treatment of persons with developmental disabilities, preferably in a community setting; other training and related work experience may be evaluated for relevance for partial substitution of the required training or experience. /Id., p. 35; Petitioner's Ex. #27.

3. Petitioner was determined to meet the minimum qualifications for the Consultant position by Richard Hodapp, then Personnel Management Selection Specialist within the Department of

Administration and Fiscal Control. /Tr. Vol. I, pp. 260, 269/.

4. Petitioner, at the time of his application for the Consultant position, had a degree in psychology and a Master's degree in guidance and counseling. /Id., p. 28/. Petitioner's work experience at that time consisted of two (2) years of service in the United States Army Medical Service Corps /Id./ as a morale officer /Id., p. 29/; and, after his discharge, as a Job Service Counselor for the State of Wyoming from July, 1973 to June, 1977. /Petitioner's Ex. #6/.

5. Petitioner's Master's degree was awarded in 1975, such that he had two (2) years post-Master's work experience at the time of his

application for the consultant position. /Id./.

6. Notwithstanding the fact that Petitioner did not meet the three (3) year requirement of post-Master's work experience noted in the minimum qualifications for the Consultant position, Mr. Hodapp felt that Petitioner was qualified for the position because his work experience and training was closely related to that required. /Tr. Vol. I, p. 272/.

7. At the time Petitioner was hired, the Developmental Disabilities (DD) unit within the Department of Health and Social Services consisted of two co-equal positions. One position was responsible for adult DD programs in the state, and the other was responsible for pre-school DD programs.

/Respondent's Ex. F/.

8. Dr. Charles Rodgers, Supervisor of the Mental Health and Mental Retardation section of the Department during the time in question /Tr. Vol. I, p. 172/, and W. Don Nelson, Director of the Department, upon Nelson's suggestion, agreed that the two positions should be restructured to make one position supervisory over the other and to broaden responsibility of both to cover all DD programs in the state. /Id., pp. 173-175/.

9. The plan to restructure the DD unit in this fashion was agreed to prior to the hiring of Petitioner /Id., p. 176/ and when Petitioner was hired, he was informed of the pending restructuring plans. /Id., p. 175/. During the interviews for the Consultant position, Dr. Rodgers advised

applicants that it was his intention that the position for which he was interviewing would ultimately be the supervisory position. /Id., pp. 176-176/.

10. On October 20, 1977, Dr. Rodgers submitted a "Request for Initial Compensation at Advanced Step" to the Personnel Division on behalf of Petitioner, citing Petitioner's "two years post-Master's experience in a related field" and that Petitioner's "position will be supervisory over the other Developmental Disabilities positions..." /Petitioner's Ex. #4/.

11. On October 24, 1977, the request was disapproved by Richard Hodapp citing that Petitioner was "eligible for step 1...." /Id./.

12. The determination of ineligibility for advanced steps was because Petitioner met only the minimum qualifications for the Consultant position and had no greater qualifications than those minimally required. [Tr. Vol. I, p. 276; WPR, Chap. X, Section 2.b.(1)].

13. On or before December 1, 1977, a Position Description Questionnaire was prepared by Petitioner and Dr. Rodgers, Petitioner's supervisor, for the purpose of reallocating Petitioner's position to a new position of DD State Program Supervisor. [Respondent's Ex. C; Tr. Vol. I, p. 127].

14. The Position Description Questionnaire was reviewed by the Personnel Division, and the determination was made that the

position should be reallocated because significant changes in tasks and duties had occurred. [Tr. Vol. I, pp. 261-267]. Petitioner, as incumbent, was required to complete an Employee Qualification Statement [Petitioner's Ex. #6] to be submitted to Personnel for comparison of his qualifications against the minimum qualifications which were established for the position of Supervisor. [Tr. Vol. I, pp. 261-267].

15. New minimum qualifications for the position of Supervisor had been promulgated by the Personnel Division because the reallocation of the Consultant position resulted in the establishment of a new job class. [Id., pp. 263, 267-268].

16. The minimum qualifications established for the supervisor position

differed materially from those of the Consultant's position in that the experience required for the Supervisor position consisted of three (3) years experience as a Consultant; or, in a similar role, whereas the Consultant position required three years as a practitioner in a DD program, or similar role. The distinction between these experience requirements is one of level of responsibility. /Tr. Vol. I, pp. 274-275/.

17. At the time when Petitioner's qualifications were compared to the minimum qualifications for the Supervisor position, he had approximately three (3) months of the required three (3) years experience. /Id., pp. 276-277; pp. 295-296/.

18. On the basis of Petitioner's lack of experience, it was determined that he did not meet the minimum qualifications established for the Supervisor position. [Id., p. 293; Petitioner's Ex. #7]. The decision was made by Nelda Skidmore, Personnel Management Analyst, and confirmed by Richard Hodapp. [Tr. Vol. I, p. 271].

19. A "Notice of Incumbent's Qualification Evaluation Results" noting Petitioner's failure to qualify was signed by Nelda Skidmore on January 25, 1978, and forwarded to W. Don Nelson. [Petitioner's Ex. #7]. The Notice was received by the Department of Health and Social Services on January 26, 1978. [Id.].

20. On February 2, 1978, W. Don Nelson sent a letter to Petitioner advising him of his failure to qualify and notifying him of the Personnel rule requiring that Petitioner's position be vacated within thirty (30) days. [Petitioner's Ex. #10]. On the same day, Pete Kithas, Administrator of the Personnel Division, notified Petitioner of his failure to qualify because "the amount, type, and level of [Petitioner's] training and experience [did] not meet those necessary for entrance into this class." [Petitioner's Ex. #11; Tr. Vol. I, pp. 66-67].

21. W. Don Nelson determined, when he received the Notice, that there existed no position within the Department to which Petitioner could be transferred and, therefore, concluded

that Petitioner was subject to separation due to a reduction in force. /Tr. Vol. II, pp. 323-324/. Nelson did not transfer Petitioner to the remaining DD position because that position was in the process of reallocation. /Id., p. 331/.

22. On February 3, 1978, Petitioner filed a grievance against Nelson concerning the reallocation to which Nelson responded on February 7, 1978. The response advised Petitioner that the determination of failure to qualify was made by the Personnel Division, and that Nelson had no authority to respond to the grievance. /Id., pp. 326-327; Respondent's Ex. G/.

23. Although the record is not completely clear, the grievance procedure was apparently terminated by

Kirk Coulter, Director of the Department of Administration and Fiscal Control, because of some problem with timeliness of the procedure. [Tr. Vol. I, pp. 74-75].

24. During the period from February 2, 1978, to February 22, 1978, Petitioner continued working; and on or about February 23, 1978, Petitioner met with Nelson for the purpose of discussing Petitioner's problem. [Tr. Vol. II, pp. 328-331].

25. At that meeting, Nelson asked Petitioner to remain in the Department and to accept the second supervised position in the DD unit. [Id., p. 332]. This offer of the second position was contingent upon a Personnel Division determination that Petitioner qualified for the position and upon Petitioner

abandoning his challenge to the determination that he did not qualify for the Supervisor position, with which determination Nelson agreed. /Id., pp. 330-333/.

26. Petitioner refused Nelson's offer because he felt that there was no guarantee that he would, in fact, obtain the second position. /Tr. Vol. I, pp. 157-158/.

27. Nelson maintains that the offer was made with the intent that a determination be made of Petitioner's eligibility prior to the date of separation, March 3, 1978. /Tr. Vol. II, p. 332/.

28. After Petitioner vacated his position on or about March 3, 1978, he filed an appeal with this Council. /Petition for Review, Docket No. 78-01/.

29. On June 19, 1978, Nelson advised Petitioner that he was terminated from state service for performance which was "less than satisfactory." [Petitioner's Ex. #12].

30. The reasons that this termination was made were primarily related to the inability of the Department to hire for the two DD positions so long as Petitioner's claim to the Supervisor position was pending [Tr. Vol. II, p. 338; Tr. Vol. I, pp. 226-227]; but Nelson maintains that Petitioner's performance was, in fact, less than satisfactory because Petitioner "was [not] skilled enough in the specifics that [Nelson] was demanding at the time to perform all the tasks necessary to complete the

reorganization and implement the program." /Tr. Vol. II, p. 338/. Further, Nelson felt that Petitioner did not know "the techniques and specifications of how programs operate, /was not/ someone who could look in an analytical fashion at the entire state and make some recommendations as to what services need to be provided...." /Id., p. 347/.

31. Nelson never advised Petitioner that his work was less than satisfactory while Petitioner was working /Id., p. 352/; however, Nelson felt that during the probationary period of one (1) year, specific criticism and discussion should be left to the third quarter of the period. /Id., p. 336/.

32. The termination letter of June 19, 1978, was prepared and sent upon

the advice of Nelson's attorney. [Id., p. 361].

33. The purpose of classification of state positions is, in part, to provide equality of compensation in positions of like duties and authority; and to provide a method of predicting job success. [Tr. Vol. I, pp. 263, 271].

CONCLUSIONS OF LAW

1. The Council has jurisdiction over the parties and subject matter of this case. [WPR, Chap. I, Section 2; W.S. 9-3-2024].

2. Petitioner, at the time of his March 3, 1978, separation, was a probationary employee within the meaning of the Wyoming Personnel Rules. [WPR, Chap. IV, Section 7.b; Chap. VII, Section 4].

3. The Personnel Rules specifically prohibit a probationary employee from appealing a dismissal. [PR, Chap. IV, Section 7.a; Chap. XIII, Section 4.a(1).] Grievances, however, may be appealed by any employee. [PR, Chap. XIII, Section 3.] We conclude, therefore, that Petitioner had a right to appeal his separation due to reduction in force of March 3, 1978. We add, however, that a probationary employee could not use the grievance procedure to appeal a probationary dismissal, for to so hold would render the specific rules prohibiting such appeal meaningless.

4. We are next required to determine Petitioner's rights once he failed to qualify for the position, bearing in mind that Petitioner was a

probationary employee. A review of the Personnel Rules will be helpful at this point. Chapter VIII, Section 5.c. of the Rules provides:

> If an occupied position is reallocated to a different classification and if the incumbent does not meet the minimum qualifications for the new classification, the employee shall not be allowed to remain in the position for more than thirty (30) days after receipt of written notice from the Personnel Division of its determination that the employee does not meet

the minimum qualifications for the new classification pursuant to Chapter IX, Section 5.c.

Chapter IX, Section 5.c. provides:

(1) If, upon review of the position's allocation, the Personnel Division determines that the existing allocation is not appropriate, the position shall be reallocated to the appropriate classification in accordance with the provisions of Section 4 of this chapter.

(2) An employee occupying a reallocated position shall, within ten (10)

days of receipt of notification, submit to the Personnel Division on the prescribed form such information as is necessary for the evaluation of the employee's qualifications for the new classification in order to determine if the employer is qualified to remain in the reallocated position. Upon receipt of such information, the Personnel Division shall evaluate the employee's qualifications and provide written notification of its determination to

the agency head and the employee.

This procedure was followed in this case. Chapter XIV, Section 3.a. provides:

> If a reduction in force is necessary in a program, employees in the effect positions shall, if possible, be given a transfer or an involuntary reappointment to another position in the agency, before any reduction in force separations are effected.

Section 3.d. of the Chapter provides:

> Reinstatement rights. Previous <u>permanent employees</u> who have been

separated due to a
reduction in force shall
have reinstatement rights
to the class from which
they were separated...
[emphasis added].

Again, the right to a transfer prior to a reduction in force separation apparently applies to all employees, while reinstatement rights are limited to those employees having attained permanent status.

Petitioner, not having attained permanent status, had a right to transfer or involuntary reappointment within the Department of Health and Social Services, if possible, prior to being separated.

5. We next decide whether Petitioner was qualified for the

position of Developmental Disabilities State Program Supervisor. The evidence presented by Mr. Hodapp and Mr. Skidmore was that Petitioner did not have the requisite three (3) years experience as a Consultant or in a similar role; and therefore, did not qualify for the reallocated position. Petitioner's expert witness, Dr. Beatty, was unable to express any opinion concerning Petitioner's qualifications to hold the position. Petitioner's supervisor, Dr. Rodgers, was of the opinion that the new minimum qualifications were identical to those of the Consultant position in all material respects and, therefore, if he had qualified for the Consultant position, he must qualify for the Supervisor position. In comparing the minimum qualifications for the two

positions /Petitioner's Ex. #2; Petitioner's Ex. #3/7, we find that the Supervisor position required three (3) years experience as a "developmental disabilities program consultant or in a similar role in a developmental disabilities program", whereas the Consultant position required three (3) years experience "as a practitioner or manager in the treatment of persons with developmental disabilities." The only evidence presented in this record indicates that there is a distinction between a "practitioner or manager" and a "consultant" which is related to type and level of responsibility. The evidence further indicates that Petitioner qualified for the Consultant position under the "related work" clause of the qualifications and,

therefore, met only the minimum qualifications for the Consultant position. Petitioner has not rebutted this evidence and we must, therefore, conclude that Petitioner was not qualified for the position of Supervisor.

6. Since Petitioner did not qualify for the position as Supervisor, he had a right to an involuntary transfer to another position within the agency, provided he could qualify. /WPR, Chap. VII, Section 1 requires that all appointments are subject to minimum qualifications./ The evidence demonstrates that Petitioner was offered the second, supervised position, provided that he could qualify for the position as reallocated, and provided that he abandon his appeal to this

Council. The first condition of the transfer was nothing more than that which the Rules require. The second condition of the transfer, we believe, was improper.

Notwithstanding the evidence presented that Petitioner's administrator agreed with the Personnel Divisions' determination that Petitioner did not qualify for the supervisory position, that determination is vested in this Council. The effect of this improper condition is problematic. Since there is no evidence in this record concerning whether Petitioner would have qualified for the second position, because Petitioner refused the offer, we cannot determine whether Petitioner had a right to the position. Petitioner's decision to refuse the

offer, moreover, was not due to the improper condition, but rather, was due to his uncertainty concerning his ability to qualify. (See Finding No. 26.) That is, Petitioner wanted a guaranty that he would qualify for the position. The evidence indicates that the offer was made with enough time remaining prior to the effective date of Petitioner's separation such that the only guaranty available, the determination of Petitioner's minimum qualifications for the position by Personnel, could have been accomplished. Petitioner's refusal to avail himself of this procedure was apparently a considered decision.

We conclude, therefore, that Petitioner did not qualify for the Supervisor position and that he refused

the only alternative under the Rules to a separation due to reduction in force. Therefore, the separation of Petitioner on March 3, 1978, was proper.

7. Because we conclude that the separation of Petitioner due to a reduction in force was proper on the evidence presented in this record, we must further conclude that Petitioner was terminated from state service on March 3, 1978. Therefore, Petitioner could not have been dismissed as a probationary employee on June 19, 1978, and such attempted dismissal was a nullity.

8. Finally, we are asked to rule that the procedure which resulted in Petitioner's separation was due to Petitioner's exercise of free speech, rather than his failure to qualify for

the supervisory position. The evidence is unrefuted that the reallocation of the positions in question was planned prior to Petitioner's appointment and that Petitioner's political activities, which he suggests is the basis for his separation, also predated his employment. To hold that the separation was somehow retaliatory for his political activities would require us to find that Petitioner was hired in order to later separate him. We believe that far more evidence than Petitioner's unsupported allegations would be required to sustain such a conclusion.

ORDER

Upon the Findings of Fact and Conclusions of Law, it is

ORDERED as follows:

(1) the determination by the Personnel Division that Petitioner did not meet the minimum qualifications for the position of Developmental Disabilities State Program Supervisor is affirmed; (2) the separation of Petitioner due to a reduction in force by the Department of Health and Social Services is affirmed.

DATED this 13th day of July, 1981.

/s/
Chairman, Wyoming
Career Services Council

/s/
Council Member